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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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NO. 74-5116

JACK ROLAND MURPHY,
Petitioner

vs.

STATE OF FLORIDA,
Respondent

ON PETITION FOR WRIT OF CERTIORI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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10

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 495 F.2d 553.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTION PRESENTED

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE OPINION BELOW WHICH HELD THE FAILURE TO GRANT PETITIONER'S MOTION FOR CHANGE OF VENUE WAS NOT A DENIAL OF DUE PROCESS WHERE PUBLICITY WAS FACTUAL RATHER THAN INFLAMMATORY AND OCCURRED AT LEAST A YEAR AND A HALF PRIOR TO TRIAL, AND JURORS WHO KNEW OF PRIOR CONVICTIONS EACH SATISFIED THE COURT OF THEIR IMPARTIALITY?

STATEMENT OF THE CASE AND FACTS

The respondent adopts the factual statement as set forth in the opinion of the court below.

ARGUMENT

Petitioner's burden in seeking to overturn a state criminal conviction in a federal court is to show "essential unfairness.. not as a matter of speculation but as a demonstrable reality." United States ex rel Darcy v. Handy, 351 U.S. 454 (1956). A violation of rights of constitutional proportions occurs only if the defendant was not tried by an impartial jury. Beck v. Washington, 369 U.S. 541, 556 (1962). In Beck v. Washington, the Court stated that the criteria for reversal of a state conviction by a federal reviewing court is not met unless the jurors' inability to render an impartial verdict is so clear as to pass beyond the realm of disputable fact and to become "a matter of law". Id. at 557.

Since 1964, the petitioner had received national publicity as one of the perpetrators of the "Star of India" theft from the New York Museum of Natural History. His notoriety stemming from this crime, having received nationwide press attention, could not have been avoided by a change of venue. Petitioner received additional publicity, however, from his conviction on March 1, 1969, for the murder of Terry Rae Kent Frank, one of the "Whiskey Creek Murders" and from his indictment by a federal grand jury on charges of conspiring to transport stolen securities in interstate commerce, charges related to the Whiskey Creek case.

It is highly significant here that all of the state and federal courts which have reviewed the press reports here complained of have concluded that they were for the most part factual accounts, and were neither highly colored nor inflammatory. The refusal of the state appellate court and the federal courts below to grant relief on the basis of prejudicial publicity is supported by the United States Court of Appeals for the Second Circuit in United States v. Agueci, 310 F.2d 817, 832 (1960):

> "The typical jury, in this age of mass-communications, is not hermetically sealed from the events occuring all about them. Of course, an effort must be made by the trial judge to caution jurors against considering extra-judicial statements pertinent to the guilt or innocence of the individuals upon whom they sit in judgment. Where the cautionary instructions are adequate, as they were here, and where the news reporting was merely routine and hardly inflamatory, the trial judge does not abuse his discretion by refusing to declare a mistrial. (Citations omitted). "Trial by newspaper may be unfortunate but it is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible." United States v. Leviton, 193 F2d at 857.

It should also be noted that the petitioner's own exhibits filed in the lower courts show the dates on the great majority of these newspaper clippings to prove publication was between December 15, 1967, and January 24, 1969. Jury selection in the case at bar began on July 27, 1970. Only five (5) articles have been presented by the petitioner bearing dates of the period of the jury selection and of these only one was sufficiently newsworthy to warrant coverage on the front page of the paper's second section. The remaining articles appeared on the paper's back pages.

Each juror was examined and each expressly disavowed that he or she would be influenced in their deliberations by any publicity surrounding the petitioner. Petitioner is therefor in the position of contending that publicity which surrounded him a year and a half to three years prior to trial, with some lesser publicity at the time of trial, must be conclusively prejudicial, in spite of the jurors' assurances to the court that they would reach a verdict based solely on the evidence presented at trial.

The question of whether each juror who possessed knowledge of petitioner's previous felony convictions should have been excluded for cause does not present a substantial federal question on the facts of the instant case. Marshall v. United States, 360 U.S. 310 (1959), decided as an aspect of this Court's inherent supervisory powers, does not require that a juror be automatically discharged if he has knowledge of a defendant's past felony convictions, especially where that juror has otherwise satisfied the requirements of impartiality. While United States ex rel Doggett v Yeager 472 F2d 229 (3rd Cir., 1973) is cited as directly conflicting, Doggett involved decidedly different facts. The publicity therein concerned a previously withdrawn guilty plea to the very same crime for which Doggett was then on trial. The publicity did not concern prior convictions. While the reasoning of the Third Circuit suggests that Marshall, supra, is now applicable as an aspect of due process as well, this Court has not so extended Marshall, and neither has any other federal Court of Appeals. Where as in the present case a guilty plea to the crime charged is not in issue, and the jurors have all given assurances of impartiality, reversal under Marshall as an aspect of due process is unwarranted.

CONCLUSION

On the facts of the instant case an insubstantial federal question has been presented, and therefore it is respectfully submitted that this Court should deny the requested petition.

Respectfully submitted,

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STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner's Reply Brief

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I

WHETHER, THE PETITIONER, WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE OF THE STATE TRIAL COURT'S FAILURE TO GRANT PETITIONER'S PRETRIAL MOTION FOR A CHANGE OF VENUE, OR TO EXCLUDE CERTAIN PROSPECTIVE JURORS BECAUSE:

(A) ALL OF THE PROSPECTIVE JURORS EXAMINED HAD OBTAINED KNOWLEDGE FROM THE NEWS MEDIA PRIOR TO THEIR EXAMINATION IN COURT THAT THE PETITIONER HAD BEEN PREVIOUSLY CONVICTED OF EITHER, BREAKING OR MURDER IN THE FIRST DEGREE.

(B) ALL OF THE PROSPECTIVE JURORS HAD BEEN SUBJECTED TO EXTENSIVE NEWS MEDIA COVERAGE FOR MORE THAN THREE YEARS, CONCERNING NOT ONLY THE FACTS OF THE CASE WHICH IS NOW BEFORE THIS COURT, BUT ALSO FACTS SURROUNDING TWO MURDERS WHICH OCCURED SHORTLY BEFORE THIS CASE AND SEVERAL PUBLICIZED LOCAL AND STATE INVESTIGATIONS DEALING WITH PETITIONER'S BEING RELEASED ON BOND AND WITH A RULING BY THE TRIAL COURT DECLARING PETITIONER INCOMPETENT OR INSANE.

STATEMENT OF THE CASE AND FACTS

Both the history of this case and the facts have been set forth in Petition for Writ of Certiorari.

ARGUMENT

The Respondent's contention with regard to Question 1(A) of the Petition is simply that while Marshall v. United States, 360 U.S. 310 (1959) is factually indistinguishable from this case, no appellate court or this Court ever stated that Marshall " is now applicable as an aspect of due process". The Respondent conceeds that the 3rd Circuit in United States ex rel. Doggett vs. Yeager,

472 F. 2d 229 (3rd Cir., 1973) is the only exception but suggests that said case is not applicable here because it involved different facts.

It is clear from a reading of Respondent's brief that it has failed to comprehend the precise issue before this Court. It is also evident that Respondent failed to consider the cases set forth in the Petition for Writ of Certiorari.

The gut issue here is whether the information which the jurors received through the news media prior to trial, to-wit: That Respondent had recently been convicted of murder and had years before been convicted of a sensational jewel theft was so prejudicial on its face that notwithstanding each jurors assurance of impartiality, said juror should have beenexcused for cause. And the failure of the Trial Court to either excuse said juror or grant a Change of Venue constituted a denial of due process and equal protection of the laws.

Nowhere is its brief does the Respondent ever argue that the jurors' knowledge of Petitioner's prior convictions is not prejudicial. The thrust of its argument is that so long as jurors give assurances of impartiality, there is no error committed in not excusing them. Such is not the law.

This Court in Marshall v. United States, supra, recognized that information of prior convictions is so prejudicial, that even with jurors assurances of impartiality, the jurors must be excluded. The Respondent's argument asks this Court to accept a double standard of prejudice. They argue that although such information may be prejudicial in Federal cases, it does not reach the proportions of prejudice to argue a violation of due process and equal protection of the laws. However, in a series of decisions by this Honorable Court , some citing Marshall v. United States, supra, the Respondent's argument is clearly rejected. See Irvin v. Dowd, 1961, 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed.2nd 751; Rideau v. Louisiana, (1963) 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663; Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600.

The Third Circuit Court of Appeals in United States, ex. rel. Doggett v. Yeager, 472 F. 2d 229 (3rd Cir. 1973), recognized this Court's application of Marshall v. United States, supra, in State Court cases. Respondent's argument that the facts in Doggett are distinguishable from this case, is a distinction without a difference. The fact remains, that the Third Circuit set forth the proper application of Marshall v. United States, supra. See also United States v. Isaacs, 351 F. Supp. 1323.

A review of this case by this Honorable Court is clearly reflected by the nature of the question presented. The opinion of this Court will affect every defendant in a criminal case who seeks to have his case tried by a jury.

CONCLUSION

For the reasons set forth in this brief as well as the Petition for Writ of Certiorari, previously filed, the Petition for Certiorari should be granted and the Judgment of the Court of Appeals reversed.

Respectfully submitted,

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